No. 87 1796

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RUTH MASSINGA, *et al.*,

Petitioners,

v.

L. J., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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May 2, 1988

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Are social workers deprived of the defense of qualified immunity and subject to private actions for damages under 42 U.S.C. §1983, because the foster care funding provision of the Social Security Act enacted in 1961 "clearly established" legal duties enforceable by suits against them for alleged breaches of that Act?

LIST OF PARTIES

The parties to this proceeding below were as follows:

1. The plaintiffs (now respondents) were individual foster children (anonymously referred to as L.J., O.S., M.S., C.S., P.G., R.K. and S.J.) and a class of foster children; and

2. The defendants (now petitioners) were a state agency, Baltimore City Department of Social Services (BCDSS), and twenty individual state officials.*

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* The individual defendants include Ruth Massinga, Maryland's cabinet level Secretary of Human Resources; Frank Farrow, then the State Director of the Social Services Administration (SSA); Joy Duva, then Director of SSA Office of Child Welfare Services; Bud Nocar, then SSA Program Manager of Foster Care Services; Alma Randall, then SSA Program Manager for 24-Hour Group Care and Licensing; George Musgrove, Director of BCDSS; Michael Warner-Burke, then Chief of Protective Services of BCDSS; and BCDSS caseworkers and supervisors, including Anthony Baird, Allen Collins, Delores Cooper, Elvia Dewatkins, Gail Fulton, Cheryl Gibson, Emma Graves, Marylyn Holcombe, Susan Lieman, Jerilyn Simmons, Bridgette Thomas, Dawn Zinkand and Susan Zuravin.

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PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in the above-entitled proceeding.

OPINIONS BELOW

The United States Court of Appeals for the Fourth Circuit and the United States District Court for the District of Maryland have decided the issue raised by this petition. The opinion of the Court of Appeals is reported at 838 F.2d 118, and is reprinted in the separate appendix to this petition ("App.") at 1a-24a. The memorandum decision and order of the district court has not been reported. It is reprinted at App. 25a-72a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on February 1, 1988. This petition was filed within 90 days of that judgment.[1/] This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

1/ The 90th day was Sunday, May 1, 1988; therefore, this petition was timely filed on Monday, May 2, 1988. See Sup. Ct. R. 29.1.

STATUTES INVOLVED

The statutes involved are:

42 U.S.C. §608 (repealed in 1980), reprinted at App. 73a-78a;

42 U.S.C. §627, reprinted at App. 79a-81a;

42 U.S.C. §671, reprinted at App. 82a-89a; and

42 U.S.C. §675 (1) and (5), reprinted at App. 90a-93a.

STATEMENT OF THE CASE

On December 5, 1984, respondents (plaintiffs below) filed this civil rights action under 42 U.S.C. §1983 in the United States District Court for the District of Maryland. They sought class declaratory and injunctive relief against twenty individual state defendants, including administrators, supervisors and caseworkers of the foster care program administered by Baltimore City Department of

Social Services, a local unit of Maryland's Department of Human Resources. The complaint alleged injuries resulting from violations of duties arising under the Constitution of the United States, the Social Security Act, and Maryland common law.

On January 30, 1985, defendants filed, in response to the money damages claims, a motion for partial summary judgment based on the qualified immunity doctrine. On July 27, 1987, the district court issued an unpublished memorandum and order denying defendants' motion. (App. at 25a-72a).2/

The State appealed the immunity decision, arguing that no affirmative duty of protection redressable by a damage action has yet been recognized, much less was it clearly established since the 1960's as alleged in

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2/ Also on July 27, 1987, the district court issued a preliminary injunction against the State in an unpublished memorandum and order.

plaintiffs' complaint.[3/] The Fourth Circuit, affirming the judgment of the district court, held that "defendants' statutory duty was clear and certain and therefore they are not entitled to invoke the immunity defense." (App. at 17a-18a).[4/]

REASONS FOR GRANTING THE WRIT

SUMMARY

This case presents the important question of whether in a §1983 suit for damages alleging violations of the foster care funding provisions of the Social Security Act state social workers have the qualified immunity defense.

[3/] The State also appealed the grant of plaintiffs' motion for a preliminary injunction. See n.2, supra.

[4/] The Fourth Circuit did not reach the question of whether defendants had a constitutional duty to protect plaintiffs. (App. at 18a). The Court of Appeals also affirmed the entry of the preliminary injunction against the State. (App. at 15a).

This Court never has held that a state's violation of the Social Security Act creates a cause of action for damages against individual state employees, and neither the Fourth Circuit nor any other circuit previously had so held. Nevertheless, in this case, the Fourth Circuit held that Congress's enactment in 1961 of the foster care provision of the Social Security Act clearly established rights and duties that plaintiffs may enforce against state social workers in their individual capacities and for money damages.

The Fourth Circuit simply was wrong to hold that a right of action for damages under §1983 was clearly established by the enactment of the foster care provisions of the Social Security Act. Such a right was not clearly established at the time of the acts or omissions of which the plaintiffs complained. At the earliest, this right did not

exist until the courts below created it (assuming, arguendo, that their holdings were correct).

This unprecedented decision broadens the foster care provisions of the Social Security Act to horizons not previously envisioned by the Congress, the Judiciary or the Executive Branch; is a wholesale expansion of civil rights law; opens the federal courts to damage suits by children against social workers for decisions made decades ago; and raises serious questions regarding the substantial risks to which Congress and the states unwittingly may be exposing state officials in numerous statutory schemes enacted in the spirit of cooperative federalism. Before social workers in Maryland and all other states receiving federal foster care funds are denied the defense of qualified immunity, this Court should review this case.

THIS CASE PRESENTS THE IMPORTANT AND UNRESOLVED QUESTION OF WHETHER STATE SOCIAL WORKERS AND SUPERVISORS ARE ENTITLED TO QUALIFIED IMMUNITY IN DAMAGE ACTIONS UNDER THE CIVIL RIGHTS ACT FOR ALLEGED VIOLATIONS OF THE FEDERAL FOSTER CARE STATUTES.

I. Under Harlow And Its Progeny, Defendant Social Workers And Their Supervisors Are Immune From §1983 Suits For Damages Unless They Violated "Clearly Established" Law.

The Fourth Circuit's decision cannot be reconciled with Harlow v. Fitzgerald, 457 U.S. 800 (1982), and its progeny. Harlow established an objective test for qualified immunity:

> . . .[G]overnment officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. at 818. Officials are immune "unless the law clearly proscribed the actions" they took. Mitchell v. Forsyth, 472 U.S. 511, 528

(1985).[5/]

Here, plaintiffs demanded money damages against social workers for injuries allegedly sustained in foster homes as early as 1969. Plaintiffs charged that their rights were violated by those social workers who placed them in or failed to remove them from foster homes that were "unsuitable". See, e.g., District Court opinion (App. 26a). The Fourth Circuit held that the social workers were not entitled to qualified immunity in this case, because they allegedly violated plaintiffs' clearly established statutory right to "care and protection", and that this right is enforceable under 42 U.S.C. §1983. 838 F.2d at 122 (App. at 17a).

5/ The unlawfulness of the official's conduct must be "apparent"; the right the official is charged with violating "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, ___ U.S. ___, 107 S.Ct. 3034, 3039 (1987).

The Fourth Circuit derived this "clearly established" statutory right to "care and protection" from a federal funding statute -- the foster care provisions of the Social Security Act -- and found that since 1961, when Congress enacted the first such provision, defendants' statutory duty was "clear and certain" by virtue of this enactment alone. Id.[6/]

This holding has a truly staggering impact on all state officials who administer federal grant programs.[7/] The Fourth

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6/ The Fourth Circuit bolstered its holding by surveying the subsequently enacted Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §670 et seq. ("Adoption Assistance Act"), specifically 42 U.S.C. §§627, 671 and 675(1) and (5). The court then concluded that "[t]aken together...these statutory provisions spell out a standard of conduct, and as a corollary rights in plaintiffs, which plaintiffs have alleged have been denied." Id. at 123 (App. at 22a).

7/ The social workers here are alleged to have violated foster children's rights as early as 1969. Plaintiff P.G. is alleged to have been placed in a home where the parents were "unfit to serve as foster parents" in 1969, when she was a toddler. See District Court opinion (App. at 29a). Unless overturned, the Fourth Circuit's holding that foster

Circuit's decision requires social workers (and by analogy all state officials administering any federal grant program) to stand trial for damages for a violation of a federal funding statute. Rather than being "clearly established", that principle is unprecedented. No reasonable social worker could have known -- or should have known -- that because the State received federal foster care funds, he or she could be made to defend such allegations on their merits and could be held personally liable for violations of the grant conditions. Conversely, and yet equally importantly, no State could have known that acceptance of these funds would strip its officials of their immunity.

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children's rights were clearly established in 1961 will expose social workers to second guessing of thousands of difficult decisions made over decades of serving children. See Md. Cts. and Jud. Proc. Code Ann. §5-201 (1987 Cum. Supp.) (The statute of limitations in Maryland is tolled until three years after a child reaches 18, unless the child has a disability thereby tolling the statute until three years after the disability is eliminated.).

Until the Fourth Circuit's decision in this case, no circuit court had ever ruled that the foster care provisions of the Social Security Act clearly established a right to care and protection enforceable through damage actions. At best, therefore, the law on this issue is "clearly established" only now.

II. A Right to Care and Protection Was Not Clearly Established by Congress's Enactment of the Foster Care Provisions of the Social Security Act.

A. There Is Substantial Doubt That Violations Of Spending Clause Statutes Create a Cause of Action for Damages Under 42 U.S.C. §1983.

This Court has suggested strongly that damages are unavailable in §1983 claims asserting deprivation of rights secured under federal grant statutes. The Fourth Circuit nevertheless discovered a right to damages under §1983 from statutes which, it concedes, "are largely statutes relating to appropriations. . . ." 838 F.2d at 123 (App. at

22a).[8] The court simply ignored the special treatment this Court has given Spending Clause cases and completely overlooked settled doctrine as to when rights enforceable under §1983 may be asserted.[9]

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[8] The Fourth Circuit's reliance on Wright v. Roanoke Redevelopment and Housing Authority, ___ U.S. ___, 107 S.Ct. 766 (1987), was misplaced. Wright did not involve money damages. In Wright plaintiffs claimed that a public housing authority overbilled them for utilities in violation of the rent ceiling imposed by the Brooke Amendment to the Housing Act of 1937, 42 U.S.C. §1437a. Plaintiffs sought an injunction and recovery of alleged past improper charges. 107 S.Ct. at 770 n. 5. These remedies are equitable, not legal. Cf. Curtis v. Loether, 415 U.S. 189, 197 (1974) (order to disgorge wrongfully withheld funds equitable in nature).

[9] Although Maine v. Thiboutot, 448 U.S. 1 (1980), held that §1983 was available to enforce violations of federal statutes by state officials, Pennhurst State Hospital and School v. Halderman, 451 U.S. 1 (1981) and Middlesex County Sewage Authority v. National Sea Clammers Assn., 453 U.S. 1, 19 (1981), recognized two exceptions to the application of §1983 to remedy statutory violations: when Congress has foreclosed enforcement of the statute in the enactment itself; and where the statute did not create enforceable rights, privileges or immunities within the meaning of §1983. To determine whether Congress meant to create legally enforceable rights under its spending power through grant-in-aid programs, Pennhurst further required an explicit expression of intent:

> ...[I]f Congress intends to impose a condition on

In Pennhurst State Hospital and School v. Halderman, 451 U.S. 1, 29 (1981), this Court observed that it has never required a State "to provide money to plaintiffs" to remedy violations of a statute enacted under the Spending Clause. Id. at 29. For this reason, Justice White, with the concurrence of Chief Justice Rehnquist, noted in Guardians Assn. v. Civil Service Commission of the City of New York, 463 U.S. 582 (1983),

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> the grant of federal monies, it must do so unambiguously.... By insisting that Congress speak with a clear voice, we enable the states to exercise their choice knowingly, cognizant of the consequences of their participation.

451 U.S. at 17. See also Edwards v. District of Columbia, 821 F.2d 651, 656 (D.C. Cir. 1987) (Wald, C.J.) ("The task for each court in determining whether a provision in a grant-in-aid program secures rights is to ask whether Congress has spoken with a 'clear voice' so that states and local governmental units may 'exercise their choice knowingly.'"). No such explicit expression of an intent to create enforceable rights within the meaning of §1983 is found in the foster care provisions of the Social Security Act.

that "make whole remedies", including damages, are ordinarily not appropriate in private actions alleging violations of the terms of federal grants. Id. at 596. "Damages indeed are usually available in a §1983 action, but such is not the case when the plaintiff alleges only a deprivation of rights secured by a Spending Clause statute." Id. at 602 n. 23. Cf. Pennhurst, supra, 451 U.S. at 29 (interpreting Rosado v. Wyman, 397 U.S. 397, 420 (1970), to limit power of courts to require states to spend funds to comply with federal funding statute).

B. Congress Did Not Create Specific and Definite Rights Enforceable By Foster Children In §1983 Damage Actions.

Nothing in the language or the legislative history of the foster care statutes remotely supports the Fourth Circuit's dis-

covery of a cause of action for damages.[10/] It is unlikely that Congress intended to create any enforceable rights at all when it enacted the foster care funding statutes, much less rights enforceable through §1983 damage suits.[11/] Nowhere in these statutes did Congress confer on foster children rights sufficiently specific and definite to qualify

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10/ Although the legislative history of the 1961 provision, 42 U.S.C. §608(f), is silent on this point, the history of the 1980 legislation (the Adoption Assistance Act) demonstrates that the prior law was not clearly established. Senator Cranston discussed the uncertainty under 42 U.S.C. §608(f): "The legislation as reported would strengthen the provisions in existing law by describing exactly what factors should be covered in the case plan. The bill provides under the proposed section 472(a)(5) that each child in foster care shall have a case plan. * * *

It is our hope that these specific requirements will assist in providing the kind of focus for case plans that is missing under current law." 125 Cong. Rec. S15290-91 (daily ed. Oct. 29, 1979) (remarks of Sen. Alan Cranston) (emphasis added).

11/ See Edwards, supra, 821 F.2d at 656: "The courts of appeals in the aftermath of Pennhurst have, for the most part, upheld rights claims in statutes that dictate little room for choice, while rejecting rights claims in statutes that merely indicate broad preferences."

as enforceable rights under §1983. See Wright, supra, 107 S.Ct. at 775.12/ Where, as here, Congress gave state officials discretion on how to meet broad policy objectives, it did not create rights enforceable through §1983.13/

The funding statutes relied on by the courts below, even taken together, fail to clearly establish specific rights actionable in damages under §1983. Absent such notice

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12/ The statutory language conditions receipt of federal funds on a state's compliance with specified requirements. 42 U.S.C. §627(a) (". . . a State shall not be eligible for payment from its allotment . . . unless . . . ."); 42 U.S.C. §671(a) ("In order for a state to be eligible for payments under this part, it shall have a plan . . . .").

13/ For example, to prevent foster care placement, Congress provided funds for eliminating the causes of removal, see 42 U.S.C. §627(b)(3), while recognizing the need for case-by-case decisions. "The Committee recognizes that the decision as to the appropriateness of (preventive services in) specific situations will have to be made by the administering agencies having immediate responsibility for the care of the child." H.R. Rep. No. 96-136, 96 Cong. 1st Sess. 47 (1979). Services to help children return to their families are to be provided "where appropriate". 42 U.S.C. §627(a)(2)(C).

that their actions were unlawful, social workers may not be deprived of their immunity. Anderson, supra, 107 S.Ct. at 3039.14/

C. Decisional Law Fails To Clearly Establish That Violations Of The Social Security Act Create A Cause Of Action For Damages Under 42 U.S.C. §1983

The Fourth Circuit is the only circuit to hold that a §1983 cause of action for damages is available for alleged violations

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14/ "[T]he right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson, supra, 107 S.Ct. at 3039. If not precisely identified, the rule of qualified immunity could be converted by plaintiffs into "a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." Id.

of the federal foster care statutes.[15] Until the lower courts divined such a right in this case, only a right to seek prospective equitable relief to enforce provisions of the Social Security Act had been "clearly established." See, e.g. Rosado, supra; Miller v. Youakim, 440 U.S. 125 (1979); King v. Smith, 392 U.S. 309 (1968).[16]

15/ Two other circuits (the Sixth and the Eighth) have found that failure to comply with provisions of the Adoption Assistance Act of 1980 does not give rise to a §1983 claim for damages. See Lester v. Lavrich, 784 F.2d 193, 197-98 (6th Cir. 1986) (alleged violation of preplacement preventive service requirement did not constitute claim for damages under §1983); Scrivener v. Andrews, 816 F.2d 261 (6th Cir. 1987) (citing Lester, damages unavailable in §1983 action alleging violation of Adoption Assistance Act); Harpole v. Arkansas Dept. of Human Services, 820 F.2d 923, 928 (8th Cir. 1987) (funding statutes enacted "to enable states to provide financial assistance to needy persons and not as a means of seeking compensation when one of those persons is indirectly injured by the State").

16/ But see Wilder v. City of New York, 568 F.Supp. 1132 (E.D.N.Y. 1983) (authorized damages under §1983 for violations of the foster care statute). Two other district courts, however, found no cause of action for damages for violations of the Social Security Act.

Congress did not intend to create any rights enforceable through §1983 damage suits. And certainly the absence of decisional law recognizing such a cause of action proves that such rights are not "clearly established".

CONCLUSION

The question of whether social workers are immune from damage actions such as this one is an important national public policy question that demands resolution by this Court. The proper administration of the foster care program requires that social workers exercise their professional judgment in the difficult and delicate area of child

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in Re Scott County Master Docket, 672 F.Supp. 1152, 1203-05 (D. Minn. 1987) (challenge to home removal resulting from suspected child sexual abuse in alleged violation of Adoption Assistance Act not actionable in damage suit under §1983). Jensen v. Conrad, 570 F. Supp. 91, 111-13 (D.S.C. 1983), aff'd on other grounds, 747 F.2d 185 (4th Cir. 1984), cert. denied, 470 U.S. 1052 (1985) (no cause of action for damages under §1983 for violations of Title IV-B of Social Security Act or Child Abuse Prevention and Treatment Act of 1974).

welfare.[17/] As a matter of law and sound public policy, social workers and all other state and local officials who administer programs financed in part by federal funds must, at the very least, be given considerably clearer notice of the individual risk they undertake on behalf of the common good.

17/ Anderson, supra, 107 S.Ct. at 3038 ("[D]amage suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties."); Davis v. Scherer, 468 U.S. 183, 196 (1984) ("Nor is it always fair, or sound policy, to demand official compliance with statute or regulation on pain of monetary damages. Such officials . . . routinely make close decisions in the exercise of the broad authority necessarily delegated to them . . . [and] should not err always on the side of caution."). Scheuer v. Rhodes, 416 U.S. 232, 241-42 (1974), ("Implicit in the idea that officials have some immunity . . . is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error than not to decide or act at all.")

This Court should grant the petition and review the judgment of the Fourth Circuit. Following review, that judgment should be reversed.

Respectfully submitted,

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